Document No. 4182
Voted at Meeting of 3/18/82

4182

March 18, 1982

MEMORANDUM

TO: The Boston Redevelopment Authority

FROM: Robert J. Ryan, Director

SUBJECT: Notice of Hearing by the Boston Redevelopment Authority Board - Staff Personnel Reduction

It is recommended that the proposed vote contained in the attachment be approved in order to effect necessary personnel economies. This proposed termination when adopted is to be effective April 16, 1982.

Attachments

March 18, 1982

NOTICE OF HEARING BY AUTHORITY BOARD

STAFF PERSONNEL REDUCTION/1 EMPLOYEE

	NAME	POSITION CLASSIFICATION	SALARY
1.	Charles A. Cotter	Relocation Officer II	$22,594

NAME	POSITION CLASSIFICATION	SALARY
Charles A. Cotter	Relocation Officer II	$22,594

VOTED: That Charles A. Cotter be given a hearing by the Boston Redevelopment Authority in the Board Room, ninth floor, City Hall, Boston, Massachusetts, at 2:30 P.M., April 1, 1982 relative to the proposed termination of his employment for cause, namely, lack of money. And that Charles A. Cotter be notified of said hearing by letter in the form attached hereto.

Boston Redevelopment Authority

Robert J. Ryan, Director

March 18, 1982

Mr. Charles A. Cotter
401 River Street
Norwell, Massachusetts 02061

Dear Mr. Cotter:

This is formal notice that the Boston Redevelopment Authority, at the meeting of March 18, 1982, voted to give you a hearing, to be held in the board room, ninth floor, City Hall, Boston, Massachusetts at 2:30 P.M., April 1, 1982 relative to the proposed termination of your employment on April 16, 1982 for cause, namely, lack of money. A copy of said vote is attached hereto. Notwithstanding the reason advanced in this notice, there is no waiver thereby of any other grounds the Authority may have as a matter of law for such proposed termination.

Enclosed is a copy of sections thirty-nine through forty-five of Chapter 31 of the Massachusetts General Laws.

BOSTON REDEVELOPMENT AUTHORITY

BY_____
Robert J. Ryan
Director

Enclosure

1 City Hall Square
Boston, Massachusetts 02201
(617) 722-4300

PROPOSED RESOLUTION

WHEREAS, on December 30, 1968 (see also resolution of January 25, 1961) the Authority pursuant to the recommendation of the then Development Administrator adopted the following policy:

"1. Re: Establishment of a class of temporary employees to be known as Development Program Employees.

Whereas, the expanded staff requirements for carrying out the Boston Development Program will exist for a temporary period and can best be met by a maximum flexibility in hiring, dismissal, promotion and transfer of staff, and

Whereas, if such staff were to be classified as permanently employed within the meaning of Section 52 of Chapter 121B of the General Laws, it would seriously jeopardize the Authority's ability to carry out the program with maximum efficiency and economy.

Therefore, be it Resolved that there shall be established a new class of temporary employees of the Authority, which shall be known as Development Program Employees who shall be employed from time to time for work in the Development Program and shall not be considered as permanent employees of the Authority. All such employees, unless otherwise specifically provided, may be dismissed at any time for cause or on three months' notice without cause."

WHEREAS, the Director has recommended that the employment of the persons listed on the attached be terminated for cause, namely, lack of money; and

WHEREAS, the Authority has found on evidence presented at the Board meeting of March 18, 1982, that lack of money warrants the termination of employment of the following named individuals and;

On motion duly made and seconded, it was

VOTED: That the employment of the following persons listed on the attachment be terminated for cause, namely, lack of money, said termination to take effect April 16, 1982. Said notice shall be in the form attached hereto and shall include a statement that the Authority does not by this action waive any other causes that it may have for the termination of said employment.

City plumbing inspector was "separated from service" within § 46E of former c. 31 requiring action of appointing officer and civil service commissioner for reinstatement, though he received leave of absence "not to exceed limitation of law governing same," where inspector neither resumed work nor obtained further leave of absence for over six months. Ferrante v. Higgiston (1937) 5 N.E.2d 49, 296 Mass. 208.

Reserve police officer and reserve fireman who were appointed to regular force of respective departments and then reduced to former positions because city of Lawrence made no appropriation to pay them was not entitled to precedence in subsequent appointments to regular force under § 46E of former c. 31 giving precedence to those who have been "separated from service," since they were demoted and not suspended. Smith v. Galvin (1935) 195 N.E. 311, 290 Mass. 307.

Policeman granted three months' leave of absence without pay because of illness was "separated from service," within § 46E of former c. 31 requiring request to be put upon special list and commissioner's consent for reinstatement. Dunn v. Commissioner of Civil Service (1932) 181 N.E. 794, 279 Mass. 504.

A duly granted leave of absence unless extended beyond the period allowed by law is not a separation from state employment. Op.Atty.Gen. Oct. 7, 1966, p. 93.

A person employed by the state who is granted a leave of absence for three months for reasons of health and who has overstayed his leave of absence for seven months and continually ignored his employer's written inquiries as to the employee's intentions, created a voluntary permanent separation from the service, even though no written declaration of resignation was made. Op.Atty. Gen. Aug. 28, 1951, p. 24.

3. Review

Through an action for declaratory judgment, a civil service employee dismissed for unauthorized absence has available judicial review from his separation from service. Canney v. Municipal Court of City of Boston (1975) 335 N.E.2d 651, 378 Mass. 648.

§ 39. Separation from employment; lack of work or money; abolition of position

If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the five-year period following the date of such separation.

Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one. Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a

written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service. As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.

Nothing in this section shall impair the preference provided for disabled veterans by section twenty-six.

Added by St.1978, c. 393, § 11.

Historical Note

Prior Laws:

G.L. c. 31 § 46G, as added by St.1935 c. 408.
St.1938 c. 297 § 2.
St.1945 c. 704 § 9.
St.1949 c. 170 § 2.
St.1967 c. 96.

Law Review Commentaries

Grievance arbitration in public sector. (1975) 9 Suffolk U.L.Rev. 721.

Library References

Officers ⇐69.10.

C.J.S Officers § 62.

Notes of Decisions

In general 2
Determination of seniority 3
Validity of prior laws 1
Veterans 4

---

1. Validity of prior laws

Section 46G of former c. 31 was constitutional and its operation would not conflict with federal EEOC requirements or executive order No. 116. Op. Atty.Gen. July 8, 1975, p. 69.

2. In general

Where employee was transferred from one kind of work to another in same class under this chapter he did not lose seniority rating. McDonald v. City Manager of Fall River (1931) 173 N.E. 593, 273 Mass. 368.

Teamsters whose rating was changed to chauffeurs, being older in point of service than chauffeur, were entitled to be employed first after temporary suspension. Id.

3. Determination of seniority

In determining who was senior in civil service under rule relating to suspension, class in which employee was registered was alone considered. McDonald v. City Manager of Fall River (1931) 173 N.E. 593, 273 Mass. 368.

The civil service director did not have the authority to compute seniority dates of employees in the classified public service, which would have bound appointing officers in determining the order of layoffs or demotions or reinstatements after layoffs or demotions, under the provisions of § 46G of former c. 31. Op.Atty.Gen. Aug. 23, 1944, p. 15.

The date of transfer of an employee to a particular department is to be treated as his seniority date with relation to suspension and to re-employment. Op.Atty.Gen. Jan. 14, 1936, p. 26.

4. Veterans

Under the provisions of § 46G of former c. 31, the preference in employment formerly given to disabled veterans when several state employees were necessarily suspended from a given position because of a shortage of work, were withdrawn, and a seniority preference was substituted in its place for the re-employment of those workers who

ere suspended. Op.Atty.Gen. June 18, 1936, p. 71.

When civil service employees are laid off, for lack of work or other temporary cause, a veteran is not entitled to preference in reinstatement ahead of others similarly laid off. 8 Op.Atty.Gen. 1926, p. 135.

§ 40. Reemployment list

If a permanent employee shall become separated from his position because of lack of work or lack of money or abolition of his position, his name shall be placed by the administrator on a reemployment list, or if a permanent employee resigns for reasons of illness his name shall be placed on such list upon his request made in writing to the administrator within two years from the date of such resignation.

The names of persons shall be set forth on the reemployment list in the order of their seniority, so that the names of persons senior in length of service at the time of their separation from employment, computed in accordance with section thirty-three, shall be highest. The name of a person placed on such reemployment list shall remain thereon until such person is appointed as a permanent employee after certification from such list or is reinstated, but in no event for more than two years. The administrator, upon receipt of a requisition, shall certify names from such reemployment list prior to certifying names from any other list or register if, in his judgment, he determines that the position which is the subject of the requisition may be filled from such reemployment list.

If the position of a permanent employee is abolished as the result of the transfer of the functions of such position to another department, division, board or commission, such employee may elect to have his name placed on the reemployment list or to be transferred, subject to the approval of the administrator, to a similar position in such department, division, board or commission without loss of seniority, retirement or other rights, notwithstanding the provisions of section thirty-three.

Added by St.1978, c. 393, § 11.

Historical Note

Prior Laws:

G.L. c. 31 § 46*I*, as added by St.1945 c. 703 § 8.
St.1946 c. 60.
St.1947 c. 12.
St.1951 c. 420.
St.1960 c. 231 § 1.
St.1967 c. 88.
St.1974 c. 835 § 130.

Library References

Officers ⇐69.10
C.J.S. Officers § 62.

Notes of Decisions

In general 1
Eligibility 3
Standard for certification 2

1. In general

An individual laid off from employment with the Commonwealth is eligible

to go on a re-employment list for positions in any municipality provided that the appointment is appropriate in the judgment of the personnel administrator. Op.Atty.Gen. May 21, 1976, p. 177.

Section 46*I* of former c. 31 directed the personnel administrator to fill any position from the re-employment list when such action was appropriate in his judgment and more precise guidelines were not provided by the section. Id.

2. Standard for certification

Standard to be used in certifying individuals on re-employment lists was set forth in section 46*I* of former c. 31, which provided that certification from the re-employment list be made where appropriate "in the judgment of the administrator". Op.Atty.Gen., May 21, 1976, p. 177.

In certifying individuals from the re-employment list the personnel administrator is not restricted to qualifications previously demonstrated in accordance with civil service procedures but may consider qualifications not previously related to the individual's past civil service history. Id.

3. Eligibility

There was no restriction on the certification of individuals from the re-employment list under § 46*I* of former c. 31 other than that, in the judgment of the director-administrator, a given individual be generally qualified for the position to which he was certified and that individuals be certified for re-employment in order of dates of original appointment, however no employee was eligible to be placed on the re-employment list until actually separated from service. Op.Atty.Gen. April 25, 1975, p. 134.

§ 41. Discharge; removal; suspension; transfer; abolition of office, reduction of rank or pay; hearings; review

Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof, except that if the action contemplated is the separation of such employee from employment because of lack of work, lack of money, or abolition of position the appointing authority shall provide such employee with such notice at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty. If such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the com-

pletion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor. Any employee suspended pursuant to this paragraph shall automatically be reinstated at the end of the first period for which he was suspended. In the case of a second or subsequent suspension of such employee for a period of more than five days, reinstatement shall be subject to the approval of the administrator, and the notice of contemplated action given to such employee shall so state. If such approval is withheld or denied, such employee may appeal to the commission as provided in paragraph (*b*) of section two.

A civil service employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. Such suspension may be imposed only by the appointing authority or by a subordinate to whom the appointing authority has delegated authority to impose such suspensions, or by a chief of police or officer performing similar duties regardless of title, or by a subordinate to whom such chief or officer has delegated such authority. Within twenty-four hours after imposing a suspension under this paragraph, the person authorized to impose the suspension shall provide the person suspended with a copy of sections forty-one through forty-five and with a written notice stating the specific reason or reasons for the suspension and informing him that he may, within forty-eight hours after the receipt of such notice, file a written request for a hearing before the appointing authority on the question of whether there was just cause for the suspension. If such request is filed, he shall be given a hearing before the appointing authority or a hearing officer designated by the appointing authority within five days after receipt by the appointing authority of such request. Whenever such hearing is given, the appointing authority shall give the person suspended a written notice of his decision within seven days after the hearing. A person whose suspension under this paragraph is decided, after hearing, to have been without just cause shall be deemed not to have been suspended, and he shall be entitled to compensation for the period for which he was suspended. A person suspended under this paragraph shall automatically be reinstated at the end of such suspension. An appointing authority shall not be barred from taking action pursuant to the first paragraph of this section for the same specific reason or reasons for which a suspension was made under this paragraph.

If a person employed under a provisional appointment for not less than nine months is discharged as a result of allegations relative to his personal character or work performance and if the reason for such discharge is to become part of his employment record, he shall be entitled, upon his request in writing, to an informal hearing before his appointing authority or a designee thereof within ten days of such

request. If the appointing authority, after hearing, finds that the discharge was justified, the discharge shall be affirmed, and the appointing authority may direct that the reasons for such discharge become part of such person's employment record. Otherwise, the appointing authority shall reverse such discharge, and the allegations against such person shall be stricken from such record. The decision of the appointing authority shall be final, and notification thereof shall be made in writing to such person and other parties concerned within ten days following such hearing.

Any hearing pursuant to this section shall be public if either party to the hearing files a written request that it be public. The person who requested the hearing shall be allowed to answer, personally or by counsel, any of the charges which have been made against him.

If it is the decision of the appointing authority, after hearing, that there was just cause for an action taken against a person pursuant to the first or second paragraphs of this section, such person may appeal to the commission as provided in section forty-three.

Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section.

Notice of any action taken under this section shall be forwarded forthwith by the appointing authority to the personnel administrator.

Added by St.1978, c. 393, § 11.

Historical Note

Prior Laws:

St.1904 c. 314.
St.1905 c. 243 § 1.
St.1917 c. 280.
St.1918 c. 247 §§ 1, 4.
St.1919 c. 350 § 83.
St.1923 c. 242 § 1.
St.1925 c. 220 §§ 2, 4.
St.1931 c. 360.
G.L.1932 (Ter.Ed.) c. 31 §§ 42A, 42B, 43, 46, 46B.
St.1932 c. 282 § 2.
St.1934 c. 249 § 1.
St.1939 c. 238 § 45.
St.1941 c. 257.
St.1945 c. 667 §§ 1, 4.
St.1946 c. 379.
St.1947 c. 373 § 1.
St.1948 c. 240.
St.1949 c. 170 § 1.
St.1949 c. 429 §§ 1, 2.
St.1955 c. 407 § 1.
St.1956 c. 629 §§ 1, 2.
St.1957 c. 432.
St.1957 c. 569.
St.1959 c. 569 §§ 1 to 4.
St.1962 c. 205.
St.1962 c. 776.
St.1963 c. 26.
St.1963 c. 801 § 72.
St.1964 c. 275.
St.1965 c. 33 §§ 1 to 3.
St.1965 c. 281.
St.1965 c. 361.
St.1968 c. 637 §§ 3 to 6.
St.1969 c. 766 § 43A.
St.1970 c. 72 §§ 1 to 5.
St.1971 c. 179 § 4.
St.1974 c. 835 §§ 122 to 125.
St.1975 c. 557 § 1.
St.1976 c. 446.
St.1977 c. 230.
St.1977 c. 507.
St.1977 c. 624.

Cross References

Arbitrary removal of certain state officers and employees, protection against, see c. 30, § 9B.

Note 88

properly sustained by municipal court. Canney v. Municipal Court of City of Boston (1975) 335 N.E.2d 651, 368 Mass. 648.

89. —— Jurisdiction, review

Civil service commission and municipal court did not have jurisdiction to hear matters stated in petition for review of discharge of civil service employee for unauthorized absence, prior to enactment of St.1974, c. 484. Canney v. Municipal Court of City of Boston (1975) 335 N.E.2d 651, 368 Mass. 648.

Jurisdiction of the personnel appeals board and the civil service commission are mutually exclusive and not concurrent; a matter coming within the jurisdiction of the personnel appeals board is not within the jurisdiction of the civil service commission; in addition, there may be matters not coming within the jurisdiction of either agency. Op.Atty. Gen. Nov. 23, 1965, p. 180.

Personnel appeals board does not have jurisdiction to hear and dispose of a further appeal through the grievance procedure in instances where an applicant chooses to appeal to the civil service commission or to the personnel appeals board and such appeal is denied. Id.

90. Certiorari, review

Petition for writ of certiorari whereby trustees of state library sought to quash so much of decision of Civil Service Commission as reduced penalty imposed by trustees on employee because of misconduct was properly dismissed for failure of petitioner to sustain its burden of showing error of law on face of the record. Trustees of State Library v. Civil Service Commission (1975) 325 N.E.2d 302, 3 Mass.App. 724.

On certiorari to review an agency determination, the judge cannot make independent findings of fact when agency has made none, any more than he may reverse or revise a decision of the agency merely because of a disagreement as to how evidence should have been weighed or what facts should have been found. Board of Selectmen of Framingham v. Civil Service Commission (1974) 321 N.E.2d 649, —— Mass. ——.

Certiorari was appropriate remedy for review of civil service commission order reversing action of school committee in abolishing position. School Committee of Salem v. Civil Service Commission (1965) 205 N.E.2d 707, 348 Mass. 696.

§ 42. Complaints; hearings; jurisdiction; filing of civil action

Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, setting forth specifically in what manner the appointing authority has failed to follow such requirements. If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights.

A person who files a complaint under this section may at the same time request a hearing as to whether there was just cause for the action of the appointing authority in the same manner as if he were a person aggrieved by a decision of an appointing authority made pursuant to all the requirements of section forty-one. If said complaint is denied, such hearing shall be conducted and a decision rendered as provided by section forty-three.

The supreme judicial court or the superior court shall have jurisdiction over any civil action for the reinstatement of any person alleged to have been illegally discharged, removed, suspended, laid off, transferred, lowered in rank or compensation, or whose civil service position is alleged to have been illegally abolished. Such civil action shall be filed within six months next following such alleged illegal act, unless the court upon a showing of cause extends such filing time.

Added by St.1978, c. 393, § 11.

Historical Note

Prior Laws:

St.1930 c. 243.
G.L.1932 (Ter.Ed.) c. 31 § 46A.
St.1959 c. 569 § 5.
St.1975 c. 557 § 1.

Cross References

Employees transferred to newly established school districts, see § 56 of this chapter.

Furnish copy of this section to police or fire fighters on punishment duty, see § 60 of this chapter.

Protection from arbitrary removals, see c. 30, § 9B.

Law Review Commentaries

Check list of limitations. Gordon D. Boynton (1944) 15 Boston Bar Bull. 99.

Extraordinary writs. Frederick L. Quilan (1942) 13 Boston Bar Bull. 131.

Mandamus in New England. (1957) 37 Boston U.L.Rev. 456.

Reinstatement. Joseph C. Duggan, 5 Annual Survey of Mass. Law, Boston College, p. 210 (1958).

Statutory modifications to civil service laws. Herbert P. Gleason, William H. Kerr and Thomas H. Martin, 18 Annual Survey of Mass. Law, Boston College, p. 384 (1971).

Library References

Officers ⇐72(1).

C.J.S. Officers §§ 61, 65, 66.

Notes of Decisions

In general 1
Back salary, recovery 12
Burden of proof 6
Damages
  In general 13
  Mitigation 14
  Recovery of back salary 12
Declaratory relief 11
Election of remedies 3
Evidence 7
Hearings, generally 5
Limitation of actions, reinstatement 9
Mandamus, generally 10
Mitigation of damages 14
Recovery of back salary
  Generally 12
  Mitigation of damages 14
Reinstatement 8, 9
  In general 8
  Limitation of actions 9
Remedies 2, 3
  In general 2
  Election 3
Waiver of defects 4

---

1. In general

Positions of 30 permanent employees of the Civil Defense Agency and Office of Emergency Preparedness were under the civil service system, for purpose of § 43 of former c. 31 providing that before any action affecting employment was

Note 11

Where theory on which plaintiff appeared to base his claim for reinstatement as police officer was that he was unlawfully induced to resign by misrepresentations of board of selectmen, not that he had been discharged in violation of civil service law, plaintiff was not required to avail himself of remedies under §§ 43, 45 or 46A of former c. 31, provided for one seeking review of discharge violating civil service law before proceeding by way of complaint seeking declaratory relief. Id.

Bill for a declaration did not lie since plaintiff, on the facts presented, was required to follow the statutory system for attacking alleged errors in the proceedings looking to the termination of his services as a city police officer. Brouillette v. City of Worcester (1974) 306 N.E.2d 252, 364 Mass. 833.

12. Recovery of back salary, generally

Where petitioner who had been plumber was employed by redevelopment authority as rehabilitation specialist, and after his discharge he had performed work as plumber at higher rate of pay than he had been paid in his employment as rehabilitation specialist, court did not err in finding that petitioner could have earned more than his former pay and refusing to award back pay to petitioner who was ordered reinstated to his former employment. Petrone v. Worcester Redevelopment Authority (1973) 305 N.E.2d 527, 1 Mass. App. 864.

Discharged employee of state hospital, upon obtaining mandamus ordering reinstatement, was entitled to recover back salary less what he did in fact earn following discharge or in exercise of proper diligence might have earned in other employment. McKenna v. Commissioner of Mental Health (1964) 199 N.E.2d 686, 347 Mass. 674.

Discharged employee of state hospital, upon mandamus ordering reinstatement, was entitled to recover all of his back pay, where, while respondents showed that he had made no effort to secure other employment, they failed to show what he could have earned in other similar work. Id.

In proper circumstance, improperly discharged civil service employee can recover back salary incident to writ of mandamus ordering reinstatement. Id.

Examiner who was restored to his position in registry of motor vehicles from which he had been discharged without compliance with notice requirements of civil service laws was entitled to back pay. Chartrand v. Registrar of Motor Vehicles (1964) 198 N.E.2d 425, 347 Mass. 470.

13. Damages—In general

A petitioner, illegally removed from public office, was, on reinstatement by mandamus, entitled only to nominal damages in the mandamus proceedings, since, on restoration to the office, he became entitled to the accrued emoluments during the entire period of his attempted removal, if found to have been able and willing to perform its duties. Hill v. Fitzgerald (1907) 79 N.E. 825, 193 Mass. 569.

14. —— Mitigation of damages

Phrase "without loss of compensation" as used in §§ 43 and 45 of former c. 31 governing discharge and removal of civil service employees and judicial review thereof and § 46A of former c. 31 governing mandamus remedy permitted mitigation of damages so that amount of back pay for reinstated officer is determined by subtracting amount that he has in fact earned or could have earned during period from discharge to reinstatement. Police Commissioner of Boston v. Ciccolo (1969) 254 N.E.2d 429, 356 Mass. 555.

Employee, who has not been accorded procedures provided by §§ 43 and 45 of former c. 31 governing removal and judicial review of civil service employees and who sought reinstatement and damages by mandamus, was subject to rule that damages recoverable are mitigated for period between discharge and reinstatement by subtracting amount employee has in fact earned or could have earned during such period. Id.

Employer has burden of proof on issue of mitigation of damages suffered by discharged employee. McKenna v. Commissioner of Mental Health (1964) 199 N.E.2d 686, 347 Mass. 674.

§ 43. Hearings before commission

If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiv-

ing written notice of such decision, so request in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission. Said hearing shall be commenced in not less than three nor more than ten days after the filing of such request and shall be completed within thirty days after such filing unless, in either case, both parties shall otherwise agree in a writing filed with the commission, or unless the member or hearing officer determines, in his discretion, that a continuance is necessary or advisable. Upon completion of the hearing, the member or hearing officer shall file forthwith a report of his findings with the commission. Within thirty days after the filing of such report, the commission shall render a written decision and send notice thereof to all parties concerned.

The commission shall affirm the action of the appointing authority if it finds that such action was justified. Otherwise it shall reverse such action, and the person concerned shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

Any hearing pursuant to this section shall be public if either party so requests in writing. The person who requested the hearing shall be allowed to answer, personally or by counsel, any of the charges which have been made against him.

The decision of the commission made pursuant to this section shall be subject to judicial review as provided in section forty-four.

Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section.

Added by St.1978, c. 393, § 11.

Historical Note

Prior Laws:

St.1904 c. 314.
St.1905 c. 243 § 1.
St.1917 c. 280.
St.1918 c. 247 §§ 1, 4.
St.1919 c. 350 § 83.
St.1923 c. 242 § 1.
St.1925 c. 220 §§ 2, 4.
St.1931 c. 360.
G.L.1932 (Ter.Ed.) c. 31 §§ 42A, 42B, 43, 46, 46B.
St.1932 c. 282 § 2.
St.1934 c. 249 § 1.
St.1939 c. 238 § 45.
St.1941 c. 257.
St.1945 c. 667 §§ 1, 4.
St.1946 c. 379.
St.1947 c. 373 § 1.
St.1948 c. 240.
St.1949 c. 170 § 1.
St.1949 c. 429 §§ 1, 2.
St.1955 c. 407 § 1.
St.1956 c. 629 §§ 1, 2.
St.1957 c. 432.
St.1957 c. 569.
St.1959 c. 569 §§ 1 to 4.
St.1962 c. 205.
St.1962 c. 776.
St.1963 c. 26.
St.1963 c. 801 § 72.
St.1964 c. 275.
St.1965 c. 33 §§ 1 to 3.
St.1965 c. 281.
St.1965 c. 361.
St.1968 c. 637 §§ 3 to 6.
St.1969 c. 766 § 43A.
St.1970 c. 72 §§ 1 to 5.
St.1971 c. 179 § 4.

request for hearing was not made within five day period. Iannele v. Fire Com'rs of Boston (1954) 118 N.E.2d 757, 331 Mass. 250.

7. Declaratory relief

Although review under §§ 43 and 45 of former c. 31 was usually exclusive remedy to challenge a dismissal from civil service, where these sections were not open to one challenging legality of appointing agency's decision, one could obtain such review by seeking declaratory relief under c. 231A. Canney v. Municipal Court of City of Boston (1975) 335 N.E.2d 651, 368 Mass. 648.

8. Review

Civil Service Commission, in reducing penalty, imposed by trustees of state library on employee for misconduct, from discharge to suspension for four months, did not err in allegedly failing to give consideration to employee's misconduct on earlier occasions and her prior suspensions, if for no other reason than trustee's failure seasonably to call the employment record to the Commission's attention. Trustees of State Library v. Civil Service Commission (1975) 325 N. E.2d 302, 3 Mass.App. 724.

Suspension of tenured police officer by town board of selectmen was required by this section to rest on "just cause," and Civil Service Commission, on request of officer for a hearing, was charged with duty of deciding whether such cause existed, but where Commission, in its decision holding that suspension for an indefinite period of time was improper, skirted issue and took refuge in the technical point of the character of the punishment, it was beyond sphere of trial court, on petition by board for certiorari, to piece out a finding of "just cause" from within Commission's decision, and case was more appropriately remanded to Commission for fulfillment of its statutory duty. Board of Selectmen of Framingham v. Civil Service Commission (1974) 321 N.E.2d 649, —— Mass. ——.

The decision of the mayor of Taunton, removing sewer commissioners from office under St.1895, p. 222, c. 219, § 4, providing that such commissioners shall be subject to removal by the mayor for cause, re-enacted in St.1904, p. 339, c. 384, § 9, was not open to review on the facts, nor unless there had been an arbitrary exercise of power, and the cause of removal was unreasonable and legally insufficient. Dunn v. Crossman (1908) 86 N.E. 313, 200 Mass. 252.

§ 44. Judicial review; petitions; seniority rights

Within thirty days after receiving notice of the decision of the commission following a hearing requested by him pursuant to section forty-two or section forty-three, a person may, if he is aggrieved by such decision, file a petition to review the commission's decision in the municipal court of the city of Boston or in the district court for the judicial district wherein such person resides. A copy of the petition shall, within the same thirty days, be served personally or by registered mail upon the commission and the appointing authority. Service on the commission shall be sufficient if service is made on any member thereof or on the secretary to the commission.

Such petition shall be addressed to the court and shall name as respondents the chairman and members of the commission and the appointing authority. It shall include a concise statement of the facts upon which jurisdiction and venue are based and which show that the petitioner is aggrieved, shall specify which of the grounds listed in the sixth paragraph of this section constitute the basis for such petition, and shall demand the relief to which the petitioner believes he is entitled.

The commission shall cause an appearance to be entered on its behalf within thirty days after service upon it of the copy of the petition for review. At the time of the hearing on the petition, the commission shall file with the court (*a*) the original or a certified copy of the record of the entire proceedings which are being reviewed, accompanied by a certification over the signature of the secretary to the commission that the same is true and complete, or (*b*) such portions of such record as the commission and the parties may stipulate, or (*c*) a statement of the case agreed to by the commission and the parties. The court may assess the expense of preparing the record as part of the costs in the case. The court may, as it deems desirable, require or permit corrections or additions to the record.

The court shall limit its review to such record, portions of the record, or statement except (*a*) the court may take testimony regarding alleged procedural irregularities before the commission which do not appear on the record, and (*b*) upon application, the court may order that additional evidence be taken before the commission, under such conditions as the court deems proper, in cases where it is demonstrated to the satisfaction of the court (1) that the additional evidence is material to the issues in the case and (2) that there was good reason for the failure to present it during the hearing before the commission. The commission, by reason of such additional evidence, may modify its findings and decision and shall file with the reviewing court, to become part of the record, such additional evidence and any modified or new findings or decision.

If a petitioner alleges that his seniority rights have been or may be violated by any action or decision which is sought to be reviewed pursuant to this section, the court may, upon application of any party in the proceedings made at any time before a final decision on the petition, and upon proper notice, order that any person whose seniority rights are alleged or appear to be junior to those of the petitioner be made a respondent in the proceedings and shall thereupon determine the rights of the respective parties therein.

The court may affirm the decision of the commission if it finds that such decision was justified or may remand the matter for further proceedings before the commission. The court may set aside and reverse the decision of the commission if it finds that such decision (*a*) violates constitutional provisions; or (*b*) exceeds the statutory authority or jurisdiction of the commission; or (*c*) is based upon an error of law; or (*d*) was made pursuant to unlawful procedure; or (*e*) is unsupported by substantial evidence; or (*f*) is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law; provided that the court shall base such finding on consideration of the record of the entire proceedings of the commission, or such portions of the record as may be stipulated by the parties, or a statement of the case as agreed to by the petitioner and the respondents.

If the court reverses the decision of the commission, the petitioner shall be reinstated in his position without loss of compensation.

The decision of the court shall be final and conclusive upon the parties, and a copy of such decision shall be forwarded forthwith by the clerk of the court to the petitioner and to all respondents in the proceedings.

Added by St.1978, c. 393, § 11.

Historical Note

Prior Laws:

St.1911 c. 624.
St.1915 c. 251.
St.1917 c. 280.
St.1918 c. 247 §§ 3, 4.
St.1918 c. 257 § 93.
St.1919 c. 5.
St.1919 c. 150 § 6.
St.1919 c. 350 §§ 102, 123.
St.1919 Sp. c. 188.
St.1925 c. 220 § 3.
G.L.1932 (Ter.Ed.) c. 31 § 45.
G.L. c. 31 § 45A, as added by St.1934 c. 190.
St.1934 c. 249 § 2.
St.1941 c. 166.
St.1945 c. 667 § 2.
St.1955 c. 407 § 2.
St.1970 c. 72 § 6.
St.1970 c. 711.

Cross References

Employees transferred to newly established school districts, see § 56 of this chapter.

Furnishing copy of this section to police or fire fighters on punishment duty, see § 60 of this chapter.

Inspectors of milk and collectors of samples, appointment and duties, see c. 94, § 33.

Involuntary retirement of civil service employees, see c. 32, § 16.

Police or firemen, refusal of permanent employment, see § 60 of this chapter.

Protecting certain permanent public employees against arbitrary removal, see c. 30, § 9B.

Retirement of city or town policemen or firemen at age 70, inapplicability of this section, see c. 32, § 90.

Separation from state service veterans holding unclassified positions, see c. 30, § 9A.

Statements required to be filed by civil service employees eligible for retirement, see c. 32, § 18.

Tenure of employees of housing authorities, see c. 121B, § 29.

Unauthorized absence of employees, applicability of this section, see § 38 of this chapter.

Veterans employed by cities and towns, application of this section, see c. 41, § 112A.

Law Review Commentaries

Boston redevelopment authority. Morton H. Aronson (1963) 43 Boston U.L. Rev. 466.

Civil service; judicial review. George N. Welch, 6 Annual Survey of Mass. Law, Boston College, p. 111 (1959).

Extraordinary legal and equitable remedies to review executive and administrative action. Arthur L. Brown (1942) 22 Boston U.L.Rev. 55.

Insurance policies. J. Albert Burgoyne, 9 Annual Survey of Mass. Law, Boston College, p. 193 (1962).

Massachusetts administrative procedure act. William J. Curran and Albert M. Sacks (1957) 37 Boston U.L.Rev. 70.

c. 624, which provided in § 1 that the decision of the police court on review of an order of removal would be final and conclusive on the parties, the police court's decision that the mayor's removal of a city marshal was without proper cause could not be reviewed. Barnes v. Rivers (1913) 99 N.E. 464, 213 Mass. 1.

§ 45. Reimbursement for defense expenses

A tenured employee who has incurred expense in defending himself against an unwarranted discharge, removal, suspension, laying off, transfer, lowering in rank or compensation, or abolition of his position and who has engaged an attorney for such defense shall be reimbursed for such expense, but not to exceed two hundred dollars for attorney fees for each of the following: (1) a hearing by the appointing authority; (2) a hearing pursuant to section forty-two or forty-three; (3) a judicial review pursuant to section forty-four; and not to exceed one hundred dollars for each of the following: (1) summons of witnesses; (2) cost of stenographic transcript; (3) any other necessary expense incurred in such defense.

Any person seeking such reimbursement shall file with his appointing authority a written application therefor within thirty days after final disposition of his case. The appointing authority shall, within thirty days after receipt of such application, pay such reimbursement from the same source as that from which the salary of the person seeking the reimbursement is paid, but only upon receipt of satisfactory proof that such expenses were actually incurred for the purposes set forth in this section.

Saturdays, Sundays, and legal holidays shall not be counted in the computation of any time period specified in this section.

Added by St.1978, c. 393, § 11.

Historical Note

Prior Laws:

St.1904 c. 314.
St.1905 c. 243 § 1.
St.1917 c. 280.
St.1918 c. 247 §§ 1, 4.
St.1919 c. 350 § 83.
St.1923 c. 242 § 1.
St.1925 c. 220 §§ 2, 4.
St.1931 c. 360.
G.L.1932 (Ter.Ed.) c. 31 §§ 42A to 43, 46, 46B.
St.1932 c. 282 § 2.
St.1934 c. 249 § 1.
St.1939 c. 238 § 45.
St.1941 c. 257.
St.1945 c. 667 § 1.
St.1946 c. 379.
St.1947 c. 373 § 1.
St.1948 c. 240.
St.1949 c. 170 § 1.
St.1949 c. 429 §§ 1, 2.
St.1955 c. 407 § 1.
St.1956 c. 629 §§ 1, 2.
St.1957 c. 432.
St.1957 c. 569.
St.1959 c. 569 §§ 1 to 4.
St.1962 c. 205.
St.1962 c. 776.
St.1963 c. 26.
St.1963 c. 801 § 72.
St.1964 c. 275.
St.1965 c. 33 §§ 1 to 3.
St.1965 c. 281.
St.1965 c. 361.
St.1968 c. 637 §§ 3 to 6.
St.1969 c. 766 § 43A.
St.1970 c. 72 §§ 1 to 5.
St.1971 c. 179 § 4.
St.1974 c. 835 §§ 122 to 125.
St.1975 c. 557 § 1.
St.1976 c. 446.
St.1977 c. 230.
St.1977 c. 507.
St.1977 c. 624.